Ment & Ors v Public Prosecutor

HIGH COURT (PENANG) — CRIMINAL REVISION NO 43–23–93
VINCENT NG JC
3 DECEMBER 1993

Criminal Procedure *— Trial — Applicants acquitted by lower court — Magistrate made an order under s 311 of the Criminal Procedure Code (FMS Cap 6) for all the applicants to be released on bail or in default, to be committed to prison pending disposal of appeal to High Court — Whether such order illegal — Whether magistrate functus officio — Criminal Procedure Code (FMS Cap 6) s 311*

Criminal Procedure *— Appeal against acquittal — Court's discretion to exercise power under s 323(i) of the Criminal Procedure Code (FMS Cap 6) to commit accused to prison or admit to bail pending disposal of appeal — Factors to bear in mind when exercising discretion*

Statutory Interpretation *— Construction of statutes — Penal statutes — Strict construction — Principles applicable*

The applicants, nine Thai nationals, were charged and acquitted for fishing in Malaysian fisheries waters without a permit, an offence under s 15(1)(a) of the Fisheries Act 1985. After acquitting the applicants, the magistrate made an order under s 311 of the Criminal Procedure Code (FMS Cap 6) ('the Code') for all the applicants to be released on bail of RM6,000 each with one local surety or, in default, to be committed to prison pending disposal of the appeal to the High Court. The applicants have applied under s 323(i) of the Code to review the decision of the magistrate.

Held, setting aside the magistrate's order in respect of the bail bond on the applicants but allowing the public prosecutor's application for the court to issue a warrant directing that the applicants be committed to prison or admitted to bail pending disposal of the appeal:

(1) An order admitting the applicants to bail has the effect of committing them to prison pending the disposal of the appeal, in the event of their default in raising the bail amount. Such an order by the magistrate was clearly illegal unless there was unambiguous conferment of this jurisdiction in s 311 of the Code or in any other provision. In this case, there was no clear provision in s 311 or in other provisions of the Code to impose such penalties on the applicants. It was beyond question that an order of acquittal does not impose any obligation or entail the suffering of any punishment. The court therefore ordered that the magistrate's order in respect of the bail bond on the applicants be set aside as she was not only functus officio but had acted outside the scope and ambit of her jurisdiction as a magistrate.

(2) The public prosecutor's application under s 315 of the Code, for the court to issue a warrant directing that the applicants be

committed to prison or admitted to bail pending disposal of the appeal, was allowed and the court ordered that the applicants be admitted to bail at RM1,500 each with two local sureties and in default, a warrant to be issued committing the applicants to prison until the disposal of the appeal against the acquittal decision of the magistrate.

Per curiam:
Any laws affecting the liberty of an individual, irrespective of whether he or she is a subject of the State or not, has to be unambiguous and clearly expressed in order to deprive such person of his or her liberty.

[Bahasa Malaysia summary

Pemohon, sembilan orang rakyat Thai, telah dituduh dan dibebaskan kerana menangkap ikan di perairan perikanan Malaysia tanpa permit, suatu kesalahan di bawah s 15(1)(a) Akta Perikanan 1985. Selepas membebaskan pemohon, majistret telah membuat suatu perintah di bawah s 311 Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu') supaya semua pemohon dilepaskan atas jaminan RM6,000 setiap orang dengan seorang penjamin tempatan atau, jika ingkar, mereka akan dipenjarakan sementara menunggu penyelesaian rayuan ke Mahkamah Tinggi. Pemohon telah memohon di bawah s 323(i) Kanun itu supaya keputusan majistret dikaji semula.

Diputuskan, mengetepikan perintah majistret berkaitan dengan bon jaminan ke atas pemohon tetapi membenarkan permohonan pihak pendakwa raya supaya mahkamah mengeluarkan suatu waran yang memerintahkan supaya pemohon dipenjarakan atau diikat jamin sementara menunggu penyelesaian rayuan itu:

(1) Suatu perintah supaya pemohon diikat jamin mempunyai kesan memenjarakan mereka sementara menunggu penyelesaian rayuan itu, sekiranya mereka gagal mendapat wang jaminan itu. Perintah sedemikian oleh majistret itu jelas menyalahi undang-undang melainkan jika terdapat suatu pemberian bidangkuasa yang jelas di bawah s 311 Kanun itu atau di dalam peruntukan yang lain. Di dalam kes ini, tidak terdapat peruntukan yang jelas di bawah s 311 atau di dalam sebarang peruntukan di dalam Kanun itu yang mengenakan penalti yang sedemikian ke atas pemohon. Tidak boleh dipersoalkan lagi bahawa suatu perintah pembebesan tidak mengenakan sebarang obligasi atau melibatkan sebarang hukuman. Oleh itu, mahkamah memerintahkan supaya perintah majistret itu berkaitan dengan bon jaminan ke atas pemohon diketepikan kerana beliau bukan sahaja functus officio tetapi telah bertindak di luar skop dan lingkungan bidang kuasanya sebagai seorang majistret.

(2) Permohonan pihak pendakwa raya di bawah s 315 Kanun itu, supaya mahkamah mengeluarkan suatu waran yang memerintahkan supaya pemohon dipenjarakan atau diikat jamin

A sementara menunggu penyelesaian rayuan itu, dibenarkan dan mahkamah memerintahkan supaya pemohon diikat jamin sebanyak RM1,500 setiap orang dengan dua penjamin tempatan dan jika ingkar, suatu waran akan dikeluarkan untuk memenjarakan pemohon sehingga rayuan terhadap keputusan majistret untuk membebaskan pemohon diselesaikan.

B

Per curiam:
Sebarang undang-undang yang mempunyai kesan ke atas kebebasan seseorang individu, sama ada beliau seorang rakyat negara itu atau sebaliknya, mestilah jelas dan nyata sebelum dapat melucutkan hak
C kebebasannya.]

Notes
For cases on appeals against the acquittal of an accused, see 5 *Mallal's Digest* (4th Ed) paras 89–97.
D For cases on the construction of penal statutes, see 11 *Mallal's Digest* (4th Ed) paras 1334–1348.

Cases referred to
1 *Woodward v Watts* (1853) 2 E & B 452 (refd)
2 *River Wear Commrs v Adamson* [1874–80] All ER Rep 1; (1877)
E 2 App Cas 743 (refd)
3 *Re Norman* (1886) 16 QBD 673 (refd)
4 *Smith Kline & French Laboratories Ltd v Salim (Malaysia) Sdn Bhd* [1989] 2 MLJ 380 (refd)
5 *Duport Steels Ltd v Sirs* [1980] 1 All ER 529; [1980] 1 WLR 142 (refd)
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6 *PP v Chu Beow Hin* [1982] 1 MLJ 135 (refd)
7 *A-G v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49 (refd)
8 *Manson v Duke of Westminister & Ors* [1981] QB 323; [1981] 2 All ER 40; [1981] 2 WLR 428 (refd)
G 9 *A-G and Board of Education v County Council of the West Riding of Yorkshire, ex p Grenside* [1907] AC 29 (refd)
10 *R v Mansel Jones* (1889) 23 QBD 29 (refd)
11 *Affin Credit (Malaysia) Sdn Bhd v Yap Yuen Fui* [1984] 1 MLJ 169 (refd)
H 12 *Lee Gee Lam v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1993] 3 MLJ 265 (refd)
13 *R v Tan Tee* [1948] MLJ 153 (distd)
14 *Re Kwan Wah Yip & Anor* [1954] MLJ 146 (distd)
15 *Suhaili bin Haji Chuchu v PP (No 2)* [1983] 2 MLJ 424 (distd)
16 *Ganesan v PP* [1983] 2 MLJ 369 (distd)
I 17 *Re VGM Holdings Ltd* [1942] Ch 235; [1941] 3 All ER 417 (refd)

Legislation referred to
Criminal Procedure Code (FMS Cap 6) s 311

VM Ravindran (*M Athimulan* with him) (*M Ravi & Co*) for the applicants. A
Ahmad Shahrir (Deputy Public Prosecutor) for the respondent.

Vincent Ng JC: The nine applicants herein ('the applicants') who are Thai nationals were charged and acquitted in the magistrates' court on the following charge: B

> Bahawa kamu semua pada 9 Januari 1993, jam lebih kurang 12.10 tengahari, di dalam vesel penangkapan ikan asing yang bernama Thwilap 21, di kedudukan Lat 05° 07.64' Utara dan Long 99° 14.89' Timur, jarak 60 batu nautikal dari Pulau Pinang, di dalam negeri Pulau Pinang, di perairan perikanan Malaysia, telah didapati menangkap ikan tanpa kebenaran perjanjian antara kerajaan Malaysia dan permit dari Ketua Pengarah Perikanan Malaysia, maka dengan ini C kamu semua telah melakukan kesalahan di bawah s 15(1)(a) Akta Perikanan 1985 dan boleh dihukum di bawah s 25(a) Akta yang sama.

The applicants have now applied to this court under s 323(1) of the Criminal Procedure Code (FMS Cap 6) ('the Code') to review the decision of the learned magistrate who, on 18 November 1993, after acquitting the D applicants of the said charge had made an order under s 311 of the Code, upon application of the prosecuting officer, for all the applicants to be released on bail of RM6,000 with one local surety or, and in default, to be committed to prison pending the disposal of the appeal to the High Court (the bail order).

The ground advanced by counsel for the applicants, Mr VM Ravindran, E is that when the learned magistrate made the bail order, she had clearly acted beyond the provisions of the law, as the provision for stay of execution pending appeal under s 311 of the Code is not intended to encompass within its ambit, a situation where persons charged are acquitted of the charge.

Obviously, the issue for judicial interpretation would turn on the proper F construction of s 311 of the Code, which states as follows:

> Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a Judge may stay execution on any judgment, *order*, conviction or sentence pending appeal, on such terms as to security *for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order*, conviction or sentence as to the Court below or to such Judge may seem reasonable. (Emphasis added.) G

There is a welter of authorities on the principles of law governing the construction of statutes, which decided as follows: H

(a) Words in an Act of Parliament are to bear the natural and grammatical construction, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification. Thus justifying I the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear. See *Woodward v Watts*[1] read with *River Wear Commrs v Adamson*[2] at p 12.

(b) Judges are to construe Acts and not to legislate, and the legislature is to provide a remedy when one is wanted.

(c) The court has no authority to limit a statute or to put upon the words of a statute a limitation which is not according to the ordinary meaning of the words. See *Re Norman*.[3]

(d) A statute should not be read to give it an effect such that it is a pointless piece of legislation. See *Smith Kline & French Laboratories Ltd v Salim (Malaysia) Sdn Bhd*.[4]

(e) All that the court has to do is to consider the plain meaning of the statute.

(f) Where the meaning of the words in the statute is plain and unambiguous, judges should not invent fancy ambiguities. See *Duport Steels Ltd v Sirs*.[5]

(g) The court must give effect to the clear and explicit language of the enacting words of the subsection. It cannot disregard them unless it is apparent that some other meaning is intended. See *PP v Chu Beow Hin*.[6] It must often be difficult to say that any terms (of a statute) are clear and unambiguous until they have been studied in their context. See *A-G v HRH Prince Ernest Augustus of Hanover*.[7]

(h) The first task of the court is to find out the intention of Parliament and the words of a statute speak the intention of the legislature. And in so doing, it must bear in mind that its function is jus dicere, not jus dare: the words of a statute must not be overruled by judges, but reform of the law must be left in the hands of Parliament. See *Maxwell on Interpretation of Statutes* (12th Ed) at pp 1 and 2.

(i) Acts imposing criminal or other penalties should be clear and unambiguous and should be construed narrowly in favour of the person proceeded against. Maxwell on *Interpretation of Statutes* (12th Ed) at pp 239–240 states the settled rule for the construction of penal sections as follows:

> 'The principle applied in construing a penal Act is that if, in construing the relevant provisions, "there appears any reasonable doubt or ambiguity", it will be resolved in favour of the person who would be liable to the penalty.' Per Upjohn J in *London & County Commercial Properties Investments Ltd v A-G* [1953] 1 WLR 312 at p 319.
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> 'If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.' Per Lord Esher MR in *Tuck & Sons v Priester* (1887) 19 QBD 629 at p 638.
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> 'If the language of the statute is equivocal and there are two reasonable meanings of that language, the interpretation which will avoid the penalty is to be adopted. The court must always see that the person to be penalized comes fairly and squarely within the plain words of the enactment.' Per Plowman J in *Re HPC Productions Ltd* [1962] Ch 466 at p 485.
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> 'The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfilment to the letter of statutory conditions precedent to the

infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction.' See *Tan Kheng Teong & Anor v PP* [1992] 2 CLJ 1273 and *Chu Beow Hin v PP* [1981] 2 MLJ 85.

The other authorities on interpretation of statutes are as follows:

(1) *Manson v Duke of Westminister & Ors*;[8]
(2) *River Wear Commrs v Adamson*;[2]
(3) *A-G and Board of Education v County Council of the West Riding of Yorkshire, ex p Grenside*;[9]
(4) *R v Mansel Jones*;[10]
(5) *Affin Credit Malaysia Sdn Bhd v Yap Yuen Fui*;[11] and
(6) *Lee Gee Lam v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.*[12]

Applying the principles for the construction of penal provisions adumbrated above, it is settled law that whatever laws affecting the liberty of an individual — irrespective of whether he or she is a subject of the state or not — has to be unambiguous and clearly expressed in order to deprive such person of his or her liberty.

The judgment of acquittal by the lower court does not become non est by the mere fact of the filing of appeal against it in the High Court. The presumption as to innocence of the accused stands fortified on his acquittal by the trial court. The judgment under appeal acquitting the accused stands till it is reversed (if at all by a superior court). The existence of the operation of such a judgment cannot be lost sight of.

An order admitting the applicants to bail pending disposal of their appeal has the effect of committing them to prison pending the disposal of the appeal, in the event of their default in raising the bail amount. Such an order by the learned magistrate is clearly illegal unless there is unambiguous conferment of this jurisdiction in s 311 of the Code or in any other provisions.

The learned deputy public prosecutor ('DPP') has submitted that the word 'order' in s 311 (as emphasized above) of the Code should include an order for acquittal, and if so, it would empower the magistrate to make the said bail order against the applicants under s 311 of the Code, upon their acquittal. This, I do not agree with, as, not only is there no clear provision in s 311 or in other provisions of the Code, to impose such penalties on the applicants — as required under the principles adumbrated above — but, on the contrary, the signification of the words (also emphasized) 'for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order, ...' in s 311, cannot be overlooked and such expression clearly showed that the legislature did not intend the word 'order' to include an order of acquittal. Surely, it is beyond question that an order of acquittal does not impose any obligation or entail the suffering of any punishment.

The four Malaysian cases cited by the learned DPP being *R v Tan Tee*,[13] *Re Kwan Wah Yip & Anor*,[14] *Suhaili bin Haji Chuchu v PP (No 2)*[15] and *Ganesan v PP*[16] are irrelevant and inapplicable to the current case as all of

them concerned the application for a stay under s 311 (and in *Suhaili*'s case,[15] s 279) of the Code following a conviction and not an acquittal of the respective defendants. In her authoritative work *Criminal Procedure in Malaysia* at p 361, Mimi Kamariah Majid was clearly of the view that s 311 deals only with the stay of execution of sentence.

Thus, I hereby order that the lower court's order in respect of the bail bond on the applicants be set aside, as she was not only functus officio (see *Re VGM Holdings Ltd*[17]) but had acted outside the scope and ambit of her jurisdiction as a magistrate.

The learned DPP has now applied under s 315 of the Code to this court to issue a warrant directing that the accused be committed to prison or admitted to bail pending disposal of the appeal. It is in the discretion of the High Court to exercise the power under the section. This section is meant not for the protection of the accused but to ensure that the accused against whom an appeal has been filed would not abscond during the pendency of the appeal.

The provision under s 315 of the Code makes for practical sense as the judge hearing the application under this provision is also clothed with inherent powers to order an early hearing of the appeal, expeditious completion of the record of appeal and even to fix a date for prompt disposal of the appeal itself in the event that such discretion is exercised by the judge.

However, in view of the long period usually taken for the disposal of appeal (unless otherwise ordered) thereby causing hardship to the defendant or accused, in whose favour the presumption of innocence stands fortified by the acquittal by the trial court, the High Court in exercising its jurisdiction under s 315 of the Code has to bear in mind the following:

(a) The provisions of s 315 also exhibit an intention of the legislature that the grant of bail is the rule and committal to prison without bail is an exception.

(b) The discretion in favour of the prosecution is exercised only sparingly and upon being satisfied that there are special circumstances to move the court.

(c) The quantum of bail set should be realistic and should not be such as to have the effect of depriving the person, who stands acquitted of the charge, of his liberty.

(d) The mere fact of an admission of appeal to the High Court from the decision of the magistrate's court does not by itself constitute special circumstances.

(e) It is desirable to also order an early hearing of the appeal itself should the court's discretion under this section be exercised.

In this case, though the court has been informed by counsel that the applicants have been in remand for a period of about 11 months covering the period pending and subsequent to the trial in the magistrates' court, yet it is this court's view that because the applicants are Thai nationals and the charge against them was, to wit, fishing illegally in Malaysian waters — which activity affects the national interests of Malaysia — these two factors

would constitute sufficient special circumstances and grounds to enable it to exercise its discretion under s 315 of the Code in favour of the public prosecutor. In the event, the DPP's application under this provision is allowed and I order that the applicants be admitted to bail at RM1,500 each in two local sureties, and in default, a warrant be issued committing the applicants to prison until the disposal of the DPP's appeal against the acquittal decision of the learned magistrate. I also order that an early date be fixed for the hearing of the appeal and that the record of appeal be made ready to this court as soon as possible. As applied, I further order that a bail bond in respect of the fishing vessel (P2) in the same quantum value and upon the same terms set by the learned magistrate, be furnished by the applicants.

Order accordingly.

Reported by Jeanne Tan